

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

WILLIAM H. GARCIA,

Plaintiff and Appellant,

v.

COUNTY OF LOS ANGELES,

Defendant and Respondent.

B204013

(Los Angeles County
Super. Ct. No. BC355860)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Joanne B. O'Donnell, Judge. Affirmed.

Law Offices of Judith A. Powell and Judith A. Powell for Plaintiff and
Appellant.

Gutierrez, Preciado & House and Calvin House for Defendant and
Respondent.

INTRODUCTION

After the Department of Children and Family Services (the Department) decided to promote an African-American woman to the position of Regional Administrator, plaintiff William Garcia, an Hispanic man, brought this race and national-origin discrimination suit premised on the Fair Employment and Housing Act (the FEHA, Gov. Code, § 12940 et seq.) against the County of Los Angeles (the County). Garcia appeals from the judgment entered after the trial court granted the County's summary judgment motion. He contends that he demonstrated (1) a prima facie case of national-origin discrimination and (2) that the County's reasons for promoting a non-Hispanic employee over plaintiff were pretextual. We hold that Garcia did not demonstrate an element of his prima facie case and did not provide substantial evidence of pretext. Accordingly, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. Departmental Organization and System for Promotions

The Department is organized with a Director at the top, followed by Chief Deputy Director, and then Deputy Directors, all executive positions. These executives are followed by Regional Administrators and Assistant Regional Administrators, which are senior management positions. Below management are the Supervising Children's Social Workers and Children's Social Workers.

Generally speaking, a non-management employee applies for promotion to the rank of Regional Administrator. Once eligible for promotion, the employee would apply for specific Regional Administrator openings. The candidates are selected to be interviewed by a panel developed by the Department's Human Resources. The panel's recommendation is sent to an Executive Team comprised of Departmental executives who would make the promotion decision.

2. Garcia's background

Garcia, an Hispanic man, began working for the Department in the 1970's. In 1990, he was promoted to Assistant Regional Administrator. After nine

months, Garcia voluntarily left the position he was then holding as Acting Regional Administrator and returned to a position as Assistant Regional Administrator at the Belvedere Office. Garcia's managerial experience consisted mostly of work at the Emergency Response Command Post (Command Post) and the Child Protection Hotline (Hotline).

3. The openings for positions as Command Post and Hotline Regional Administrator

In December 2004, the Department posted a job bulletin announcing an examination for promotion to Regional Administrator. Two openings for Regional Administrators are at issue in Garcia's complaint, one at the Hotline and one at the Command Post. For these positions, the Department preferred candidates with Department-wide "broad experience" to implement change by involving community stakeholders and all levels of departmental staff. The Department also expected these Regional Administrators to have enough knowledge about operations, strategies, and priorities to move easily from management of regional offices to that of specialized operations.

The Hotline receives all calls of alleged child abuse in the County. It operates every day, all day. Between 8:00 a.m. and 5:00 p.m., follow-up for each call is assigned to the appropriate regional offices' Command Posts. For the position of Regional Administrator for the Hotline, the County wanted "a broad based and diverse background in child welfare" and an "extensive knowledge of departmental resources" so that the Administrator's staff could properly assess calls and make appropriate referrals. Equally important was the "ability to navigate within a large organization to locate the necessary and appropriate assets to address the specific services needed based on the referral" The Hotline's Regional Administrator was also expected to be able to educate the community about the Department's role.

With respect to the Command Post, however, as the result of the closure of the McLaren Children's Center, among other reasons, an unacceptable number of

children were remaining at the Command Post for excessive periods of time, including overnight. Troubles at the Command Post were attracting negative media exposure and were the focus of concern among the Department's executives and the County's Board of Supervisors. Because of the immediate need to resolve a crisis in that unit, the Department could not afford to wait for a new Regional Administrator to learn the specific responsibilities of the Command Post. Thus, the Department created an exception to the general rule that any qualified applicant could be promoted to Regional Administrator of the Command Post, and instead required that the Command Post Regional Administrator have previous experience.

In 2005, Garcia applied for promotion to Regional Administrator. Garcia satisfied the minimum qualifications for the promotion, as did Cleo Robinson, an African-American woman, and Jennifer Lopez, an Hispanic woman. The Department placed Garcia, Robinson, and Lopez in the first band for interviews based on the appraisal of promotability score given by their supervisors, meaning they were either "recommended" or "strongly recommended" candidates for promotion to Regional Administrator. In particular, their supervisors rated Robinson and Lopez "strongly recommended," and Garcia "recommended," with the result that these three employees were eligible for any Regional Administrator job opening for which they applied.¹

Garcia received an interview for the Command Post position because he had prior experience there. Garcia's managerial experience in his specific assignments at the Command Post and the Hotline was an "important consideration" in the decision to interview him for both Regional Administrator positions.

¹ Although Garcia disputes that he was not interviewed, he made it past this part of the process.

4. The interviews and promotion decisions

Deputy Director Amaryllis Watkins served on the interview panel for the Hotline and the Command Post openings. Both panels included a social worker, a supervisor, a Regional Administrator, and an advisor from the community. Each panel member could ask one identical question to each interviewee but no follow-up questions. After completion of the interviews, the panels discussed the candidates and made recommendations, which recommendations Watkins presented to the Executive Team who made the final promotion decisions.²

The Executive Team for the Hotline and Command Post openings discussed the interview panels' recommendations and made a selection for each of the two posts. The Executive Team consisted of the Department's Director, Dr. David Sanders, Dr. Jackie Acosta, Patricia Ploehn, Angela Carter, Joan Smith, Leo Yu, Dr. Charles Sofie, Anita Shannon, Lisa Parrish, and Watkins. Watkins was present during the Executive Team's discussions, but she declared she did not have the authority to make the promotion decision on her own for any promotion to Regional Administrator position.

The Executive Team selected Robinson for promotion to Regional Administrator responsible for the Hotline and Lopez to the position of Regional Administrator of the Command Post.

5. Garcia's lawsuit

After receiving a right to sue letter from the Department of Fair Employment and Housing, Garcia brought this action in 2006 seeking damages for national-origin discrimination, among other causes of action. Garcia alleged that

² Watkins was unable to locate the documents containing the recommendations she forwarded to the Executive Team.

the Department discriminated against him by not promoting him to the Hotline or Command Post jobs because he is Hispanic.³

The County moved for summary judgment of the national-origin discrimination cause of action on the grounds (1) Garcia could not establish a prima facie case; (2) the County had legitimate, non-discriminatory reasons for its actions; and (3) Garcia could not establish pretext.

In support of its motion, the County proffered undisputed facts, backed by properly authenticated documentary evidence, showing that prior to the promotions, Watkins had never supervised Garcia, Lopez, or Robinson. Watkins was acquainted, but not friends, with Robinson and Lopez before the promotions. Robinson knew Watkins's husband, but they did not have a friendship; they had worked at McLaren Children's Center at the same time but in different areas and had minimal interaction.

Watkins declared that no member of the interview panels for either the Hotline or Command Post openings made any inappropriate or derogatory remark about the race or ethnicity, gender, or age of any candidate, including Garcia. Neither race nor ethnicity was a topic of discussion during the panel's deliberations. Neither interview panel had the authority to make the promotion decision. Nor could the panels eliminate candidates. Although Garcia was qualified and chosen to interview for both open positions, he was not the top candidate for either job.

Watkins, who was present during the Executive Team's deliberations, declared that the Executive Team considered the candidates for the Command Post and Hotline positions. No member of the Executive Team made any inappropriate or derogatory remark about race or ethnicity of any candidate, including Garcia.

³ Garcia withdrew his cause of action based on age discrimination and the trial court dismissed his gender discrimination cause of action and so those claims are not at issue in this appeal.

Ethnicity was not a topic of discussion during the Executive Team's deliberations, and was not a consideration in the promotion decision for the Regional Administrator positions for the Hotline and Command Post jobs.

Garcia did not dispute that Watkins never made a negative remark to Garcia about his ethnicity. Garcia never heard Sanders make a negative remark about anyone's ethnicity. No member of the Executive Team ever made a negative remark to Garcia about his ethnicity. Garcia never heard any member of the Executive Team make a negative remark about anyone's ethnicity. No one employed by the County ever engaged in any physical action or visual display towards Garcia that demonstrated a bias against him because of his ethnicity.

Garcia benefitted from the Department's requirement that the applicant for the Command Post job have specific experience rather than the broad experience usually sufficient for applicants for Regional Administrator positions. However, relying on Watkins's declaration authenticating the handwritten notes of the interview panelists, the County demonstrated that although Garcia was qualified and chosen to interview for both open positions, there were many criticisms of his responses to questions that were unrelated to unlawful or discriminatory factors. The panelists found that Garcia rambled and was not focused or persuasive during the interview. As compared to Lopez and Robinson, Garcia spoke more about himself and less about the children whom the Department serves and the Department's mission. Garcia did not have as much recent broad experience as Robinson in the operations area of the Department. His managerial experience consisted mostly of work at the Command Post and Hotline. While his work at those positions was important, Garcia was not the top candidate from the panelists' perspective.

Watkins explained that although qualified, Garcia did not "speak as knowledgeably as Ms. Robinson and Ms. Lopez about the recent changes in the Department's mission or important new Department initiatives." Also, "Ms. Robinson and Ms. Lopez were persuasive in explaining how they could help [the

Department] reach its goals of safety and reduction in use of out-of-home care. As compared to them, Mr. Garcia was less persuasive in that regard.”

By comparison to Garcia, Watkins declared, Robinson had (1) broader experience in the operation of the Department, including recent initiatives; (2) stronger leadership skills and was more decisive; (3) more knowledge about recent changes in the Department’s mission and creative approaches within the Department; (4) more experience managing regional offices, providing direct services to families and children, and serving as interim Regional Administrator for former Region VI and the Hawthorne Office; (5) functioned in an executive capacity enabling her to learn all facets of the Department; and (6) was more persuasive during the interview about how to reach Department goals and utilize Department strategies.

In December 2005, there were three Regional Administrator/Division Chiefs who were Hispanic men over the age of 50. In August 2007, there were three Regional Administrator/Division Chiefs who were Hispanic men over the age of 50. Ed Sosa, an Hispanic man over the age of 50, replaced Lopez as the Command Post Regional Administrator when she was transferred in February 2007.

In opposing the summary judgment motion, Garcia asserted that the Department preferred to hire African-Americans, and if no applicant met that criterion, to hire females over qualified male candidates. In support of this assertion, Garcia requested that the trial court take judicial notice of a transcript from an appeal before the Civil Service Commission brought by another employee, Diane Weissburg, from a decision not to promote Weissburg. Garcia cites to testimony in that transcript that assistant Regional Administrator Asaye Tsegga told the witness that an executive said that the Department preferred to promote African-Americans and not Hispanics. The trial court sustained the County’s hearsay and other evidentiary objections to that transcript and declined to take judicial notice of it.

Garcia also suggested that Watkins rigged the selection process to favor Robinson. As evidence of this, he observed that Watkins is African-American and that the four Regional Administrators that Watkins has ever had influence over hiring were African-American. He also pointed to the lack of evidence, apart from Watkins's declaration, about what was said at the Executive Team meetings. Otherwise, in opposing the County's summary judgment motion, Garcia attempted to dispute most of the County's facts.

The trial court ruled that Garcia did not demonstrate the fourth element of a prima facie case for discrimination, namely, a circumstance suggesting discriminatory motive, because he presented no admissible evidence that the decisionmakers considered unlawful factors when making their collective choice. The court also ruled that Garcia did not provide evidence that the Department's proffered legitimate reason for its decision to promote Robinson instead of Garcia was pretext for discrimination. Plaintiff's timely appeal followed.

CONTENTIONS

Garcia contends that he demonstrated a prima facie case of national origin/race discrimination and of pretext. He does not challenge the Department's decision to promote Lopez.

DISCUSSION

1. *The standard of review*

"The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute. [Citation.]" (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) Thus, summary judgment is granted when a moving party establishes the absence of a triable issue of material fact and the right to entry of judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) A defendant moving for summary judgment meets its burden of showing there is no merit to a cause of action if that party shows that one or more elements of the cause of action cannot be established or

there is a complete defense to the cause of action. (Code Civ. Proc., § 437c, subd. (p)(2).) Once the defendant has made such a showing, the burden shifts to the plaintiff to show a triable issue of one or more material facts exists as to that cause of action or as to a defense to the cause of action. (*Aguilar v. Atlantic Richfield Co.*, *supra*, at p. 849.) If the plaintiff does not make such a showing, summary judgment in favor of the defendant is appropriate.

On appeal from a summary judgment, we make “an independent assessment of the correctness of the trial court’s ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law. [Citations.]” (*Iverson v. Muroc Unified School Dist.* (1995) 32 Cal.App.4th 218, 222-223.) We “review the record de novo, considering all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained. [Citation.]” (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.) We construe the moving party’s affidavits and declarations strictly, and the opposing party’s evidence liberally, and resolve doubts about the propriety of granting the motion in favor of the party opposing it. (*Castillo v. Express Escrow Co.* (2007) 146 Cal.App.4th 1301, 1306.)

2. Burden shifting in discrimination cases

With particular reference to discrimination claims under the FEHA, because direct evidence of discriminatory motive is seldom available, California courts have adopted the “three-stage burden-shifting test established by the United States Supreme Court” articulated in *Guz v. Bechtel National, Inc.*, *supra*, 24 Cal.4th at page 354 as an aid to presentation of discrimination cases. Thereunder, the plaintiff-employee must set forth sufficient evidence to establish a prima facie case of discrimination. (*Id.* at pp. 354-356.) Generally, to do so, the employee must show that he was: (1) a member of a protected class, (2) qualified for and was performing competently in the position he held, (3) suffered an adverse employment action, and (4) some circumstance suggesting discriminatory motive.

(*Id.* at p. 355.)

If the plaintiff makes the prima facie showing, the burden shifts to the moving-party employer to present evidence of a non-discriminatory reason for the adverse employment action. (*Guz v. Bechtel National, Inc.*, *supra*, 24 Cal.4th at p. 357.)

If the employer makes its showing, the burden shifts back to the employee to avoid summary judgment by offering (1) “ ‘evidence that the employer’s stated nondiscriminatory reason for the adverse action was untrue or pretextual, or [(2)] evidence the employer acted with a discriminatory animus, or [(3)] a combination of the two, such that a reasonable trier of fact could conclude the employer engaged in intentional discrimination.’ [Citations.]” (*Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 806-807.)

To be successful in averting summary judgment, the plaintiff’s evidence of pretext must be substantial and responsive. (*Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal.App.4th 1718, 1735.) “It is not enough for the employee simply to raise triable issues of fact concerning whether the employer’s reasons for taking the adverse action were sound.” (*Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1005.) To survive summary judgment, Garcia had to show the County’s reason was implausible, inconsistent, incoherent, or contradicted by other facts (*Guz v. Bechtel National, Inc.*, *supra*, 24 Cal.4th at p. 363; *Hersant v. Department of Social Services*, *supra*), such as would give rise to the inference the County “acted with a motive to discriminate illegally.” (*Guz v. Bechtel National, Inc.*, *supra*, at p. 358.) Garcia was obligated to provide evidence that placed the County’s “credible and sufficient showing of innocent motive in material dispute by raising a triable issue, i.e., a permissible inference, that, in fact, [the Department] acted for discriminatory purposes. [Citation.]” (*Id.* at p. 362.) He must show more than that “the employer’s decision was wrong, mistaken, or unwise.” (*Horn v. Cushman & Wakefield Western, Inc.*, *supra*, 72 Cal.App.4th at p. 807.) He “ ‘ ‘must demonstrate such weaknesses,

implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder *could* rationally find them 'unworthy of credence,' [citation], and hence infer 'that the employer did not act for the [. . . asserted] non-discriminatory reasons.' [Citations.]" [Citations.]" [Citation.]" (*Ibid.*) With these rules in mind, we turn to the showings.

a. *Garcia cannot establish an element of his prima facie case of national-origin discrimination.*

In his complaint, Garcia alleges that his national origin was a substantial factor in, and the real reason that, Robinson was selected for the Hotline position. In moving for summary judgment, the County first asserted that Garcia could not establish a prima facie case of national origin discrimination. To be sure, Garcia has satisfied the first three of the four elements. (*Guz v. Bechtel National, Inc., supra*, 24 Cal.4th at p. 355.) (1) He is a member of a protected class based on his national origin. (2) He was qualified for the positions of Regional Administrator of the Hotline and Command Post. Indeed, that is the reason he was interviewed for those positions. (3) He suffered an adverse employment action in that he was not promoted to either of these open positions. (See *Akers v. County of San Diego* (2002) 95 Cal.App.4th 1441, 1455.)

Nonetheless, Garcia has not demonstrated the fourth element of the prima facie case under *Guz*, namely, that the people who were promoted in his stead -- Robinson and Lopez -- were not members of a protected class or some other circumstance suggesting discriminatory motive. The operative allegations in Garcia's complaint are that he was discriminated against because he is Hispanic. However, Lopez, who was promoted to the Command Post position, is also Hispanic. Therefore, with respect to that job, he cannot demonstrate he was discriminated against on the basis of ethnicity. Nor has he made a prima facie case with respect to the Hotline position because Robinson is an African-American and hence also a member of a protected class. Finally, it is undisputed

that three Regional Administrator/Division Chiefs were Hispanic men at the time Garcia applied for promotion to that rank.

On appeal, Garcia contends he has demonstrated “some other circumstance suggest[ing] discriminatory motive. [Citations.]” (*Guz v. Bechtel National, Inc.*, *supra*, 24 Cal.4th at p. 355.) He points to the fact that Watkins, “the person with the most significant role [in] choosing Robinson was also an African-American.” He observes that the four Regional Administrators that Watkins has ever had influence over hiring were African-American. Thus, he infers Watkins’s motivation was based on discrimination.

However, no inference of discrimination arises from the reference to the four Regional Administrators over whose hiring Watkins had influence. We know nothing about the circumstances behind the hiring of those four, such as who else was in contention for those jobs, or who make the ultimate hiring decisions in those cases. Otherwise, the undisputed portion of the record shows that Watkins had a diluted influence in the decisions to promote Robinson and Lopez. Those decisions were made after consideration by the interview panels and 10 other people on the Executive Team. Garcia did not dispute that Watkins did not participate in the interviews. Nor did he dispute that while Watkins was present during the Executive Team discussions and conveyed the results of the panel interviews, *she did not have the authority to make the promotion decision on her own for any promotion to Regional Administrator position, including the Command Post or Hotline jobs.*

Garcia’s assertion that Watkins *must* have discriminated because she and Robinson are both African-American is not supported by any evidence and is merely supposition. Lopez was promoted to a position for which Garcia applied, and there is no suggestion that Lopez is African-American. Even if, as Garcia suggests, Watkins preferred to promote people of her own race, that fact would not give rise to the inference that the decisionmakers, i.e., *the Executive Team*, “acted with a motive to discriminate illegally.” (*Guz v. Bechtel Nat. Inc.*, *supra*, 24

Cal.4th at p. 358, italics added.) “[W]hile the plaintiff’s prima facie burden is ‘not onerous’ [citation], he must at least show ‘ “ ‘actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were’ based on a [prohibited] discriminatory criterion’ [Citation.]” [Citation.]’ [Citations.]” (*Id.* at p. 355.) Here the actions were not unexplained; the County demonstrated legitimate non-discriminatory reasons for the promotion decisions. Furthermore, Watkins’s race, even coupled with the four African-American Regional Administrators, does not raise a reasonable inference that it was more likely than not that the decisions of the *10 other people* on the Executive Team to promote Robinson was based on a prohibited discriminatory criterion, particularly where Watkins played a limited part in the decision to promote Robinson, and it is undisputed that race was not a factor in the decision. As Garcia did not make a prima facie case of discrimination, the burden never shifted to the County to make its showing. (*Id.* at p. 357.)

b. *Assuming for purposes of analysis only that Garcia carried his burden in the first instance, the County carried its burden to show a non-discriminatory reason for promoting Robinson.*

Even assuming Garcia did present a prima facie case thereby shifting the burden to the County, in its moving papers, the County presented admissible evidence of a reason, unrelated to national origin or race, for its decision to promote Robinson to the Hotline position and not Garcia. (*Guz v. Bechtel National, Inc.*, *supra*, 24 Cal.4th at p. 357.) In particular, the County demonstrated, and Garcia did not dispute, that ethnicity was not a consideration in the promotion decision for the Regional Administrator positions for the Hotline and Command Post. Neither the Hotline nor the Command Post interview panels used discriminatory criteria, and neither recommended Garcia as a top choice. The Executive Team made the promotion decisions for the Command Post and Hotline positions and no Executive Team member made any inappropriate or derogatory remark about race or national origin. Ethnicity was not a topic of

discussion during the Executive Team's deliberations and was not a consideration in the promotion decisions for the Command Post and Hotline jobs.

Furthermore, the County demonstrated specific reasons for choosing Robinson over Garcia based on the former's qualifications and unrelated to illegal criteria.

Garcia observes that Watkins did not produce the documents summarizing the interview panel's recommendations that she presented to the Executive Team. Garcia suggests that Watkins manipulated the summaries' contents to obtain the outcome she wanted. Garcia also cites portions of Watkins's deposition transcript that the only information that the Executive Team received were Watkins's summaries, which he assumes she manipulated, and the Team members' own information. However, there is no evidence of this scheme other than Garcia's supposition. Instead, the County produced the actual pages that the interview panelists filled out and that were made into Watkins's summaries, and they support the recommendations Watkins declared she gave to the Executive Team, ranking Robinson higher than Garcia. Thus, even assuming Watkins controlled the process, the same result would have obtained. Otherwise, the County's showing of non-discriminatory reasons for promoting Robinson was made by other competent and admissible evidence (Code Civ. Proc., § 437c, subd. (d)) in the form of Watkins's declaration, which declaration was legally sufficient to establish that the promotion decision *was facially unrelated to prohibited bias* (*Guz v. Bechtel National, Inc.*, *supra*, 24 Cal.4th at p. 358), *as it had nothing to do with race or national origin*. (*Horn v. Cushman & Wakefield Western, Inc.*, *supra*, 72 Cal.App.4th at p. 806.) Thus, the County met its burden by articulating a legitimate reason for promoting Robinson and not Garcia.

c. *Garcia demonstrated no factual dispute about pretext to preclude summary judgment of his national-origin discrimination claim.*

Garcia's task was "to *rebut* [the County's] facially dispositive showing by pointing to evidence which nonetheless raises a rational inference that *intentional*

discrimination” “on grounds prohibited by the statute, was the true cause of the employer’s actions. [Citation.]” (*Guz v. Bechtel National, Inc.*, *supra*, 24 Cal.4th at pp. 357, 361.) Garcia’s burden was to produce “ ‘substantial evidence that the [Department’s] stated nondiscriminatory reason for the adverse action was untrue or pretextual, or evidence that the [Department] acted with a discriminatory animus, or a combination of the two, such that a reasonable trier of fact could conclude the employer engaged in intentional discrimination.’ [Citations.]” (*Horn v. Cushman & Wakefield Western, Inc.*, *supra*, 72 Cal.App.4th at pp. 806-807.)

Toward that end, Garcia first contends that he had more extensive experience than Robinson and that her qualifications were “comparable,” and “arguably inferior” to his. A closer look at the employment evaluations, Garcia argues, contradicts the findings of the interview panelists, and otherwise Robinson had lower overall interview scores than Garcia. However, the evidence Garcia cites does not contradict the County’s asserted fact, supported by the actual evaluations of his answers to the interview questions, that the interview panelists did not find Garcia to be the best candidate. At best, Garcia demonstrated that Robinson also received some comments that were not entirely positive. More to the point, however, Garcia cannot create a triable issue of fact by *opining* that he was better qualified. “[A]n employee’s subjective personal judgments of [his] competence alone do not raise a genuine issue of material fact. [Citation.]” (*Bradley v. Harcourt, Brace and Co.* (9th Cir. 1996) 104 F.3d 267, 270.)⁴ “[W]here an employer’s proffered non-discriminatory reason for its employment decision is that it selected the most qualified candidate, evidence of the applicants’

⁴ “Because of the similarity between state and federal employment discrimination laws, California courts look to pertinent federal precedent when applying our own statutes. [Citation.]” (*Guz v. Bechtel National, Inc.*, *supra*, 24 Cal.4th at p. 354.)

competing qualifications does not constitute evidence of pretext ‘unless those differences are so favorable to the plaintiff that there can be no dispute among reasonable persons of impartial judgment that the plaintiff was clearly better qualified for the position at issue.’ [Citation.] In other words, ‘[i]n effect, the plaintiff’s credentials would have to be so superior to the credentials of the person selected for the job that “no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question.” ’ [Citations.]” (*Millbrook v. IBP, Inc.* (7th Cir. 2002) 280 F.3d 1169, 1180-1181.) The undisputed evidence shows that Garcia’s qualifications did not categorically outshine Robinson’s. Indeed, Garcia admits this by stating hers were “arguably” inferior.

Garcia’s burden is to demonstrate that the County’s proffered explanation was *untrue*. “[T]he focus [of the anti-discrimination statutes] is to ensure *neutral* employment and personnel decisions. Thus, ‘the employer has the discretion to choose among equally qualified candidates, provided that the decision is not based upon unlawful criteria.’ [Citation.]” (*Odima v. Westin Tucson Hotel Co.* (9th Cir. 1993) 991 F.2d 595, 602.) Toward that end, “It is not enough for the employee simply to raise triable issues of fact concerning whether the employer’s reasons for taking the adverse action were sound. What the employee has brought is not an action for general unfairness but for age discrimination. While, given the inherent difficulties in showing discrimination, the burden-shifting system established by the Supreme Court is a useful device to facilitate the adjudication of claims of discrimination, it ultimately, however, does not change what the employee must prove. In our judgment the fact an employee is the member of a protected class and has demonstrated triable issues concerning the appropriateness of the adverse action taken does not so readily demonstrate a discriminatory animus that it is alone sufficient to establish the fact of discrimination or alone sufficient to avoid summary judgment.” (*Hersant v. Department of Social Services, supra*, 57 Cal.App.4th at p. 1005.)

Next, Garcia attacks the selection process. He argues that the Department's reasons for promoting Robinson "shifted" from Garcia's lack of focus and rambling interview style to his lack of "broad" experience. He theorizes that the Department, or Watkins, re-defined the job prerequisites to require more "broad" experience for the Hotline position so that Robinson would qualify for the job while preferring specific experience for the Command Post opening. Actually, Garcia demonstrated no "shift" in requirements; the evidence showed that the rule was that *all employees who qualified were eligible for promotion to any Regional Administrator position, regardless of specific experience*. The exception to this rule was not for the Hotline position that Robinson got, but for the Command Post opening which, because of the crisis facing the Command Post, necessitated certain *specific* qualifications. The Department required more specific experience for the Command Post position, filled by Lopez. But there is no evidence that the Department manipulated the process by *broadening* the qualifications for the Hotline job so that Robinson could fill it. In any event, the Department's evidence showed that Garcia received an interview for the Command Post opening exactly because he had specific experience as an Assistant Regional Administrator at the Command Post. Thus, the specific-experience requirement actually boosted Garcia's chances for the Command Post position. Had specific experience not been a requirement, Watkins declared, Garcia might not have received an interview for that job at all because he was not considered strongly promotable.

Garcia focuses much of his appeal on a transcript of testimony by a Department employee at an appeal before the Civil Service Commission, brought by another employee, Diane Weissburg, from a decision not to promote Weissburg. At Weissburg's appeal, a Department employee apparently testified about overhearing Assistant Regional Administrator or Asaye Tsegga make a statement concerning another employee's alleged preference for African-Americans over Hispanics. The trial court denied Garcia's request to take judicial notice of this transcript and sustained the County's evidentiary objections

to that transcript, and to Weissburg's declaration filed in this case. On appeal, Garcia argues that the trial court erred in sustaining the evidentiary objections because, even if multiple hearsay, the transcript is admissible if the speaker was involved in the employer's decision. Garcia cites *Godwin v. Hunt Wesson, Inc.* (9th Cir. 1998) 150 F.3d 1217, that "an admission by an agent within the scope of his employment is admissible. [Citation.]" (*Id.* at p. 1221.)

The trial court properly sustained the County's objections to the transcript and declaration. The transcript does not contain a certification from the reporter, and is not authenticated by the declarant. (Evid. Code, §§ 1400 & 1401.)⁵ Instead, the citation is merely a random collection of unnumbered pages, made up of a variety of fonts, with no identification of the witnesses. Apart from the authentication problems, the statements are inadmissible multiple hearsay. (Evid. Code, § 1200.) Garcia focuses on testimony therein that Tsegga told the witness that an *unidentified third person, purportedly an executive*, said that the Department was going to promote African-Americans, not Hispanics. It is impossible to ascribe that statement to an agent of the Department, let alone to someone who was involved in the decision to promote Robinson and Lopez over Garcia. (See *Godwin v. Hunt Wesson, Inc.*, *supra*, 150 F.3d at p. 1221.) Certainly, there is no evidence that the person who made the statement was Watkins, as Garcia would like to think. (*Ibid.*) Without evidence that the statement was made by someone who was involved in the decisionmaking process here, the comment, even if admissible, is entitled to "virtually no weight" in our analysis. (*Horn v. Cushman & Wakefield Western, Inc.*, *supra*, 72 Cal.App.4th at

⁵ Evidence Code section 1400 reads: "Authentication of a writing means (a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is or (b) the establishment of such facts by any other means provided by law." Section 1401 reads: "(a) Authentication of a writing is required before it may be received in evidence. [¶] (b) Authentication of a writing is required before secondary evidence of its content may be received in evidence."

p. 809; accord, *Slatkin v. University of Redlands* (2001) 88 Cal.App.4th 1147, 1160.)

Consequently, Garcia has been unable to provide substantial, responsive evidence that the County's stated non-discriminatory reasons for hiring Robinson are untrue or pretextual. The trial court properly granted the County's motion for summary judgment.

DISPOSITION

The judgment is affirmed. Costs on appeal to respondent.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

KLEIN, P. J.

KITCHING, J.